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SUPREME COURT, U.S.

NO. 76-5416

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

RUBY JONES, PETITIONER

v.

DOUGLAS HILDEBRANT, and the CITY AND COUNTY  
OF DENVER, a municipal corporation, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF COLORADO

~~BRIEF OF THE PETITIONER~~

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September, 1976

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(iii)

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SUPREME COURT OF THE STATE OF COLORADO

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BRIEF OF THE PETITIONER  
\_\_\_\_\_

TO: THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME  
COURT OF THE UNITED STATES:

Your Petitioner, Ruby Jones, hereby petitions for a Writ  
of Certiorari to review the decision of the Supreme Court of  
the State of Colorado affirming the judgment of the trial court  
and ruling that the Colorado measure of damages governs a case  
brought in state court pursuant to 42 U.S.C. §1983.

#### OPINION BELOW

The opinion of the Colorado Supreme Court is not yet  
reported either officially or unofficially. However, a copy  
of the Slip Opinion and the Order denying Petitioner's Motion  
for Rehearing are appended hereto as Appendices "A" and "B".  
The opinion was issued May 24, 1976, Chief Justice Pringle and  
Justice Groves dissenting, Justice Kelly not participating.

#### JURISDICTION

The decision sought to be reviewed was made and entered  
on May 24, 1976, and a timely Motion for Rehearing was denied  
on June 21, 1976. The statutory provision believed to confer  
on this Court jurisdiction to review the judgment in question  
is 28 U.S.C. §1257(3).

#### QUESTIONS PRESENTED FOR REVIEW

Where the black mother of a 15-year-old child who was  
intentionally shot and killed by a white policeman acting  
under the color of state law brings a suit in state court  
pursuant to 42 U.S.C. §1983, what is the measure of damages?  
Particularly, can the state measure of damages cancel and  
displace an action brought pursuant to 42 U.S.C. §1983?

Same  
as  
stated  
in  
Pringle  
B

#### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Const., Article VI, Section (2), provides:

This constitution, and the laws of the United  
States which shall be made in pursuance thereof  
# . . # shall be the supreme law of the land;  
and the judges of every state shall be bound  
thereby; anything in the constitutions or laws  
of any state notwithstanding.

2. U.S. Const., Amend. XIV, provides in part:

\* \* \* nor shall any state deprive any person of  
life, liberty, or property without due process  
of law \* \* \*

3. 42 U.S.C. §1983, states:

Civil action for deprivation of rights  
Every person who, under color of any statute,  
ordinance, regulation, custom, or usage, of  
any State or Territory, subjects, or causes  
to be subjected, any citizen of the United  
States or other person within the jurisdiction  
thereof to the deprivation of any rights,  
privileges, or immunities secured by the  
Constitution and laws, shall be liable to the  
party injured in an action at law, suit in  
equity, or other proper proceedings for redress.  
(R.S. §1979).

4. 42 U.S.C. §1988, states:

Proceedings in vindication of civil rights  
The jurisdiction in civil and criminal matters  
conferred on the district courts by the provisions

of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.  
(R.S. §722).

5. Colo. Rev. Stat. Ann. §§13-21-201 through 13-21-203

(See Appendix "C").

#### STATEMENT OF THE CASE

In October 1973, Plaintiff, Ruby Jones, filed a Complaint in the District Court of the City and County of Denver, State of Colorado, against Douglas Hildebrant, Brian Moran, and the City and County of Denver. Moran was subsequently dismissed from the suit. Plaintiff's Complaint, which, as amended, alleged battery, negligence, and deprivation of civil rights under 42 U.S.C. §1983, stated that Douglas Hildebrant, a white police officer employed by the City and County of Denver, intentionally shot and killed her unarmed black son, Larry, while acting under the color of state law. She prayed for \$1,500,000 compensatory damages and \$250,000 exemplary damages.

The Defendants admitted the shooting but asserted that it was justified on the grounds that Larry Jones was a fleeing felon, that Officer Hildebrant acted in self defense, and that he used no more force than he reasonably believed to be necessary.

At trial, after both sides had rested, the Defendants moved to dismiss the Plaintiff's civil rights claim. In granting the Defendants' Motion, the Court ruled that the Colorado

measure of damages controlled all three of the Plaintiff's claims. Consequently, it held that the civil rights claim merged with the other claims and refused to instruct the jury on the civil rights claim. The jury rejected the Defendants' contentions and found for the Plaintiff, but returned a verdict in her favor of only \$1,500. From this verdict, the Plaintiff appealed.

The judicial issues were raised both in the trial court at the Motion to Dismiss and in the Colorado Supreme Court; the Colorado Supreme Court holding that the state law with respect to wrongful death controlled the damages available to the Plaintiff under 42 U.S.C. §1983. That the constitutional question was considered is demonstrated by the dissenting opinion of Chief Justice Pringle in which Justice Groves joined:

"I do not believe that Colorado's judicial limitation of net pecuniary loss as a measure of damages for wrongful death applies to actions founded upon 42 U.S.C. §1983 (1970)." [Slip Opinion, at p. 16].

#### REASONS WHY CERTIORARI SHOULD BE GRANTED

Beginning with Monroe v. Pape, 365 U.S. 167 (1961), this Court has emphasized the feasibility of bringing actions pursuant to 42 U.S.C. §1983 to protect and compensate victims whose civil rights have been abused. In Scheur v. Rhodes, 416 U.S. 232 (1974), this Court extended that doctrine to cases where the unlawful act caused death. This Court has never, however, broached the question of the measure of damages applicable where the tort results in death. The instant case provides an ideal vehicle with which to fill this void.

The case is the sort clearly envisioned by the Congress when it passed the civil rights acts. Larry Jones, an unarmed black teenager, was shot in the back of the head by a white police officer who acted intentionally and under the color

of state law. It is hard to imagine a more wanton act. Yet, because Colorado adheres to the archaic net pecuniary loss rule which severely restricts the measure of damages in wrongful death actions, Petitioner has been effectively denied a remedy. It is Petitioner's contention, as argued more fully below, that the intent behind the civil rights acts was to provide a federal remedy where federal rights have been impaired. Should this Court refuse to grant certiorari, the mother of a teenage boy shot by a policeman will be "compensated" by only \$1,500.

In short, the issue presented by this case has never been considered by this Court. Additionally, this case presents an ideal fact situation for consideration of that issue. The wanton shooting of a black child is an obvious deprivation of a civil right. Finally, the issue is well defined; there are no collateral issues which would prevent this Court from fully considering the merits of the case. It is for these reasons that the Petitioner respectfully requests this Court to issue a Writ of Certiorari.

#### ARGUMENT

THE STATE MEASURE OF DAMAGES DOES NOT CONTROL AN ACTION BROUGHT PURSUANT TO 42 U.S.C. §1983 WHERE THE TORT RESULTED IN DEATH.

While it is well established that the parents of a child wrongfully killed by one acting under color of law may bring suit pursuant to 42 U.S.C. §1983, Scheur v. Rhodes, supra, this Court has never stated what the measure of damages in such an action should be. The Colorado Supreme Court ruled that "Colorado's wrongful death remedy would be engrafted into a §1983 action. . . ." (Slip Opinion, p. 11). It also ruled:

"Furthermore, because the allowable damages are such an integral part of the right to bring a wrongful death remedy, we believe the state's law on damages should also apply." (Slip Opinion, p. 12).

These excerpts of the Court's opinion show the fallacy of the decision. Federal law provides no statute indicating who is a proper plaintiff to bring an action pursuant to 42 U.S.C. §1983 where the tort results in the death of the victim. Hence, courts in the absence of federal law have looked to state law to determine standing. See, e.g., Mattis v. Schnarr, 502 F.2d 588 (8th Cir., 1974); Brazier v. Cherry, 293 F.2d 401 (5th Cir., 1961). It is clear that under Colorado law, Ruby Jones had standing to bring this lawsuit. Colo. Rev. Stat. Ann. §§13-21-201, 13-21-202 (1973).

In contrast to the void in the federal law on standing, there is a federal common law of damages and a federal statute, 42 U.S.C. §1988, governing the measure of damages in actions brought pursuant to 42 U.S.C. §1983. For example, in Bastista v. Weir, 340 F.2d 74 (3d Cir., 1965), the plaintiff brought suit against two policemen and the chief of police, Weir, pursuant to 42 U.S.C. §1983. The jury returned a verdict against one of the policemen, which verdict was upheld by the Third Circuit. The Court stated:

"We are of the opinion, as we have stated, that the federal common law of damages command the issue of damages in the case at bar." (Id. at 87; accord, Caperici v. Huntoon, 397 F.2d 799 (1st Cir., 1968)).

Similarly, in Sullivan v. Little Hunting Park, 396 U.S. 229 (1969), this Court stated:

"Compensatory damages for deprivation of a federal right are governed by federal standards as provided by congress in 42 U.S.C. §1988. . . ." (Id. at 239).

The Court continued:

"This means as we read §1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in federal statutes. cf. Brazier v. Cherry, 293 F.2d 401. The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired." (Id. at 240).

The rule that the federal and not the state measure of damages controls the instant case is consistent with the congressional intent in passing the civil rights acts. In Monroe v. Pape, supra, this Court noted that there were three purposes behind the civil rights acts. One of these was to provide "a remedy where state law was inadequate." (Id. at 1973).

In his concurring opinion in Monroe, Justice Harlan emphasized this point stating:

"There will be many cases in which the relief provided by the state to the victim of a use of state power will be far less than what congress may have thought would be fair reimbursement for deprivation of a constitutional right." (Id. at 196, n. 5).

Thus, both the case law and the congressional intent indicate that federal law controls the measure of damages in an action brought under 42 U.S.C. §1983.

Additionally, it is clear that when Congress enacted 42 U.S.C. §1983, it intended the statute to apply to cases in which the tortfeasor caused a death. In Monroe, the court quoted Senator Lowe of Kansas, who stated:

"While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been vested upon unoffending American citizens, the local administrations have been found inadequate to apply the proper corrective."  
\* \* \*

The instant case presents precisely the situation foreseen by the court in Monroe. Colorado has one of the strictest rules of damages imaginable in wrongful death actions. Damages are limited to the net pecuniary loss (i.e., the financial loss) sustained by the Plaintiff as a result of the death. Where the victim is a child, this frequently means that the only recovery is funeral expenses. See, e.g., Kogul v. Sonheim, 150 Colo. 316, 372 P.2d 731 (1962); Herbertson v. Russell, 150 Colo. 110, 371 P.2d 422 (1961). Not only are damages limited by the pecuniary net loss rule, but with certain exceptions inapplicable to the case at bar, recovery is limited

to \$45,000. Colo. Rev. Stat. Ann. §13-21-203 (1973). Moreover, Colorado does not permit exemplary damages in wrongful death cases. Moffat v. Tenney, 17 Colo. 189, 30 P.348 (1892). Finally, Colorado provides no compensation for the loss of a civil right.

The federal rule is not as restrictive. There is no case in which the federal courts, as a matter of federal law, have applied the restrictive pecuniary net loss rule. There is no federal limitation on the amount of damages which can be recovered under 42 U.S.C. §1988. Exemplary damages have often been awarded as a result of actions brought pursuant to 42 U.S.C. §1983. See generally, 14 A.L.R. 2d 608 (1973).

Critical to the Colorado Supreme Court's ruling is that the measure of damages under 42 U.S.C. §1988 and under state law are identical. This ignores the fact that under federal law the loss of a civil right is itself compensable, even though it is not a pecuniary loss. In Rhoads v. Horvat, 270 F.Supp. 307, (D. Colo., 1967), the Court held:

"In the eyes of the law, this right to vote is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing, and the amount of the damages is a question peculiarly appropriate for the determination of the jury because each member of the jury has personal knowledge of the value of the right." (Id. at 309).

Similarly, in Farber v. Rizzo, 363 F.Supp. 386 (E.D. Pa., 1973), the Plaintiff brought a civil rights action against the police for interfering with his First Amendment right to leaflet at a speech being given by President Nixon. The Court held:

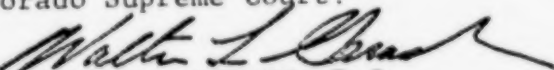
". . . Courts may award compensatory damages to plaintiffs who are deprived of constitutional rights. [Citations omitted] The value of such rights, while difficult of assessment, must be considered great." (Id. at 398).

Ruby Jones was clearly entitled to be compensated for the loss of her civil right. Yet under the decision of the Colorado Supreme Court, this has become impossible.

# CONCLUSION

One of the purposes of passing the civil rights acts was to provide a federal remedy where state remedies were inadequate. This applied to actions which resulted in death. In the case at bar, the state remedy is clearly inadequate; given the realities of litigation, Ruby Jones will never see one penny of the \$1,500 the jury awarded her. Even if she were to receive the entire amount, it would do little more than cover the costs of burying her son. Conversely, in the instant case, the federal measure of damages provides for non-pecuniary damages, exemplary damages, damages for the deprivation of a civil right, and has no statutory maximum.

Officer Hildebrant subjected himself to federal law when he shot Larry Jones, yet the Colorado Supreme Court has limited that federal statute by shackling it with the Colorado measure of damages. In so doing, the Colorado court violated Article VI of the United States Constitution, which provides that the federal law shall be the supreme law of the land. Consequently, the Petitioner respectfully asks this Court to issue a Writ of Certiorari to the Colorado Supreme Court.

  
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NO. 26828

RUBY JONES, )  
 )  
Plaintiff-Appellant, )  
 )  
v. )  
 )  
DOUGLAS HILDEBRANT, and the )  
CITY AND COUNTY OF DENVER, a )  
Municipal Corporation, )  
 )  
Defendants-Appellees. )

MAY 24 1966

Appeal from the District Court of the City & County of Denver

Hon. Charles Goldberg, Judge

EN BANC

JUDGMENT AFFIRMED

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 )  
Attorney for Plaintiff-Appellant.  
 )  
Wesley H. Doan, )  
Joseph A. Davies, )  
 )  
Attorneys for Defendants-Appellees.

MR. JUSTICE HODGES delivered the Opinion of the Court.

Plaintiff-appellant Jones recovered, as the result of a jury trial, a \$1500 judgment against the defendant-appellees Hildebrant and the City and County of Denver for the wrongful death of her fifteen-year old son. She appeals from this judgment solely on the damage issue. We find no error and therefore affirm the judgment of the trial court.

In her complaint, plaintiff alleged that defendant Hildebrant, while acting in his capacity as a Denver police officer, wrongfully shot and killed her son. The City and County of Denver was joined as a defendant because of its alleged liability as a principal. Her amended complaint stated three claims for relief: (1) battery, (2) negligence, and (3) a violation of civil rights. The first two claims were based on the Colorado wrongful death statute, section 13-21-202, C.R.S. 1973. The third claim was premised on 42 U.S.C. §1983. It will be referred to as the §1983 claim in this opinion. She prayed for \$1,500,000 compensatory damages and \$250,000 exemplary damages.

It was admitted that defendant Hildebrant intentionally shot plaintiff's son while acting within the scope of his employment and under color of state law. Liability was denied, however, on the basis that

the defendant police officer was attempting to apprehend a fleeing felon or in the alternative was acting in self-defense, and that he was using no more force than was reasonably necessary for these purposes.

Prior to trial, the court dismissed the §1983 claim, ruling that it merged with plaintiff's other claims under the Colorado wrongful death statute. In addition, the trial court ruled that the wrongful death statute did not permit the recovery of punitive damages, and it also limited plaintiff's recovery to a maximum of \$45,000 because she was not a dependent of the deceased. After being instructed that plaintiff could recover only the pecuniary losses she sustained as a result of the death of her son,<sup>1</sup> the jury returned a verdict of \$1500 in her favor.

Plaintiff asserts that the judgment should be reversed and a new trial ordered on the issue

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<sup>1</sup> In accordance with our ruling in Herbertson v. Russel, 150 Colo. 110, 371 P.2d 422 (1962), the jury was instructed that net pecuniary loss is the financial loss sustained by the plaintiff as a result of the death of her son. Such losses would include the value of any services that he might have rendered and earnings he might have made while a minor together with any support he might have been expected to provide her after he became an adult, less the expenses she would have incurred in maintaining him.

of damages because (1) her damages under the wrongful death statute were unconstitutionally restricted by the net pecuniary loss rule, (2) that her recovery was inadequate, as a matter of law, and (3) that additional damages should have been permitted under her §1983 claim because that cause of action was not limited by the pecuniary loss rule.

I.

Plaintiff-appellant asserts that this court erred in Pierce v. Conners, 20 Colo. 178, 37 P. 721 (1894), when it interpreted the wrongful death statute as permitting the recovery of only compensatory damages for the loss of a decedent's services and support and not permitting the recovery of damages for the survivor's grief or for punitive damages. As a result, she argues that her statutory remedy has been unjustly restricted in violation of her rights under Colo. Const. Art. II, §25, and the Fourteenth Amendment of the United States Constitution. Alternatively, she argues that "net pecuniary loss" should be defined to include the pecuniary value of her loss of comfort, society and protection.

This court has rejected similar arguments on numerous occasions and has adhered to the net pecuniary loss rule. See, e.g., Kogul v. Sonheim, 150 Colo. 316,

372 P.2d 731 (1962); Herbertson v. Russel, 150 Colo. 110, 371 P.2d 422 (1962); Denver & R.G.R.R. v. Spencer, 27 Colo. 313, 61 P. 606 (1900). In response to the argument that the rule unjustly restricts her statutory remedy, we stated in Herbertson that

"[t]he suggestion that this Court should depart from its prior pronouncements defining the measure of damages recoverable under our wrongful death statute would do utter violence to the well-established rule of statutory construction that when a legislature repeatedly re-enacts a statute which has theretofore received a settled judicial construction, there can be no doubt as to the legislative intent, and in such circumstances it must be considered that the particular statute is re-enacted with the understanding that there be adherence by the judiciary to its former construction...."

Also, in Kogul, we specifically held that the net pecuniary loss rule does not allow for the compensation of parental grief.

We therefore adhere to the precedent firmly established in this state and reject the defendant's request to overrule our previous pronouncements on the law in this state on the "net pecuniary loss" rule.

II.

The plaintiff also maintains that the verdict returned by the jury is inadequate, as a matter of law, on the basis of the evidence of her son's habits

of industry and disposition to help her. Based on our review of this record, we cannot conclude that the verdict is "grossly and manifestly inadequate" as to "clearly and definitely indicate that the jury neglected to take into consideration evidence of pecuniary loss or were influenced either by prejudice, passion or other improper considerations." See Kogul v. Sonheim, supra.

The evidence of plaintiff's damages was vague and insubstantial. She testified that her son occasionally helped her with household chores, that he once worked at the East Side Action Center, and that from his earnings there, he once gave her \$30 to pay a utility bill. No documentary evidence of funeral expenses was apparently offered to the jury, though some evidence tended to show that these expenses were approximately \$1000. Under these circumstances, the trial court refused to set aside the verdict of the jury,<sup>2</sup> and to order a new trial on the damage issue alone. We agree with the trial court's ruling.

### III.

Plaintiff-appellant next contends that her §1983 claim should not have been dismissed because it

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<sup>2</sup> Compare Kogul v. Sonheim, supra, in which this court upheld an award for \$700 for the wrongful death of a three-year old child.

would have permitted her to recover damages not otherwise available under the state wrongful death action, including punitive damages and damages for mental anguish and loss of society. She advances what are, in reality, four distinct theories to support her position.

Her first theory, although confusingly stated, seems to be that the state wrongful death statute recognizes her claim to a civil right to her son's life, which was denied her without due process of law through his wrongful killing. This argument, in our view, misperceives the meaning of either "liberty" or "property" as protected by the Due Process Clause.

The United States Supreme Court in Paul v. Davis, \_\_\_\_ U.S. \_\_\_\_, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), has recently addressed this question in an analogous §1983 case where the issue was whether or not a person's right to sue for damages to his reputation under state law created a right to "property" or "liberty" which was unconstitutionally denied him when a state officer allegedly defamed him. The Court held that such a right to sue for damages did not create a right which could be denied solely by the underlying act

of defamation. Accordingly, the Court distinguished the right to sue from other property rights, such as, a driver's license:

"In each of these cases [e.g., the suspension of a driver's license], as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment. But the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the 'liberty' or 'property' recognized in those decisions. Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioner's actions. Rather his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions. And any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of any 'liberty' or 'property' recognized by state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the state's laws."

The logic behind the Supreme Court's distinction is evident. The right to sue becomes a right protected by the Fourteenth Amendment only when the statutorily

guaranteed access to the courts is denied. Therefore, where, as here, the state allows a plaintiff to bring her suit, she is not deprived of any of her civil rights without due process of law.<sup>3</sup>

Secondly, the plaintiff argues that although §1983 does not expressly create a wrongful death action for a violation of civil rights, 42 U.S.C. §1988 authorizes the incorporation into federal law of state wrongful death remedies to vindicate violations of civil rights that result in death. She further contends that only that part of the state law granting her this right to sue should be incorporated, but not the state law relating to damages.

We agree with the plaintiff that the federal courts have commonly ruled that §1988 permits the incorporation of the states' non-abatement statutes<sup>4</sup>

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<sup>3</sup> Accord, Jones v. Murphy, 392 F. Supp. 641 (E.D. Ala. 1975), which held that an administratrix's rights under the Alabama wrongful death statute was not a property right protected by the Fourteenth Amendment.

<sup>4</sup> The following courts have held that §1983 actions which accrued during the lifetime of the decedent do not abate at his death but survive to his estate according to state law: Spence v. Staras, 507 F.2d 554 (7th Cir. 1974); Hall v. Wooten, 506 F.2d 564 (6th Cir. 1974); Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961); Troutman v. Johnson City, 392 F.Supp. 556 (E.D. Tenn. 1973); Javits v. Stevens, 382 F.Supp. 131 (S.D. N.Y. 1974). See also Annot., 88 A.L.R. 2d 1153.

and wrongful death statutes<sup>5</sup> into §1983 actions in order to effectually implement the policies of that legislation.<sup>6</sup> For example, the leading case, Brazier v. Cherry, supra, n. 4, allowed a surviving widow to recover damages sustained by the decedent during his lifetime and damages sustained by his survivors as a result of his wrongful death by incorporating the Georgia survival statutes. The court reasoned that the civil rights legislation was designed to protect citizens not only from violence which would

<sup>5</sup> The following cases have incorporated the states' wrongful death remedies into §1983 actions so that a personal representative can bring actions in behalf of certain designated beneficiaries or so that the beneficiaries themselves may bring an action in their own right: Wolfer v. Thaler, 525 F.2d 977 (5th Cir. 1976); Spence v. Staras, supra, n. 4; Mattis v. Schnarr, 502 F.2d 588 (8th Cir. 1974); Brazier v. Cherry, supra, n. 4; Smith v. Wickline, 396 F. Supp. 555 (W.D. Okla. 1975); Jones v. Murphy, supra, n. 3; Pollard v. United States, 384 F. Supp. 304 (M.D. Ala. 1974); Bailey v. Harris, 377 F. Supp. 401 (E.D. Tenn. 1974); Smith v. Jones, 379 F. Supp. 201 (1973), sum. aff'd., 497 F.2d 924; Love v. Davis, 353 F. Supp. 587 (W.D. La. 1973); Galindo v. Brownell, 255 F. Supp. 930 (S.D. Cal. 1966).

<sup>6</sup> In Moor v. County of Alameda, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973), the Court held that §1988 was not intended to be a basis for an independent cause of action but it was designed only to permit the incorporation of state remedies to effectuate causes of action that arise in other parts of the civil rights act. It then cited Brazier with apparent approval as an example of the proper incorporation of state law under §1988. Consistently, the Court in Moragne v. United States Marine Lines, infra., n. 10, characterized a wrongful death action as essentially remedial because it does not impose an additional duty of care on the tort-feasor.

cripple but also from violence that would kill.

However, because no express provision was established for the survival of §1983 claims where death occurs, the court held that Congress must have intended to adopt as federal law the forum state's law on survival by means of §1988. The Supreme Court also concluded that 42 U.S.C. §1986, which provides for a limited survival action for suits brought under §1985 which relates to conspiracies to deprive others of their civil rights, should not be interpreted as demonstrating a Congressional intent to exclude survival remedies from other portions of the Act. Rather, it held that, to be consistent with the manifest Congressional intent to provide a civil rights remedy even when death occurs, the omission of express survival remedies in §1983 was indicative of Congressional intent to incorporate state remedies.

We therefore conclude that Colorado's wrongful death remedy would be engrafted into a §1983 action if brought in a federal court. However, because the instant suit was brought in state court and joined with a suit under the state wrongful death statute, the trial court properly ruled that the two actions

were merged so that the §1983 claim should be dismissed.<sup>7</sup>

Furthermore, because the allowable damages are such an integral part of the right to bring a wrongful death remedy, we believe the state's law on damages should also apply.<sup>8</sup> Though not directly ruling on this issue, federal courts have implicitly adopted the state limitations on wrongful death damages. In Smith v. Wickline, *supra*, n. 5, the Oklahoma wrongful death remedy was adopted even though it did not

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<sup>7</sup> The suit under the state claim was, in fact, a broader remedy because it allowed a recovery against the City and County of Denver, which because of its status as a municipality, would not probably be liable under §1983. See Moor v. County of Alameda, *supra*, n. 6, and Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

<sup>8</sup> Our ruling thus accords with what appears to be the federal policy of wholly incorporating state wrongful death remedies when incorporation of state law is the Congressional intent. For instance, in The Tungus v. Skovgaard, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524 (1959), the Court observed that the "policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor even that tortious conduct resulting in death shall be actionable, but that damages shall be recoverable when conduct of a particular kind results in death. It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose."

allow the recovery of punitive damages. In Galindo v. Brownell, *supra*, n. 5, the California wrongful death statute was used even though it only allowed the recovery of pecuniary losses by a parent.<sup>9</sup> Finally, in Jones v. Murphy, *supra*, n. 3, only punitive damages were allowed because the Alabama law did not allow compensatory or actual damages.

Plaintiff Jones' third theory is that a federal wrongful death remedy impliedly exists in §1983, independent of state wrongful death remedies. Though the United States Supreme Court has ruled that federal wrongful death remedies impliedly exist in some areas<sup>10</sup> of the law, we do not believe that such a remedy exists

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<sup>9</sup> See also Spence v. Staras, *supra*, n. 4, where the Illinois wrongful death remedy, which permitted the recovery of only pecuniary losses, was incorporated into a §1983 suit. The court there allowed the recovery of punitive damages but its reasons for doing so are unclear. Most likely, the court allowed such damages in connection with another claim based on the damages sustained by the decedent while he was alive, damages which the court noted were recoverable under Illinois law.

<sup>10</sup> For instance, in Moragne v. States Marine Lines, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), the Court held that an implied action for wrongful death based on unseaworthiness is maintainable under federal maritime law by the decedent's dependents. In Sea-Land Services v. Gaudet, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974), the Court began to spell out some of the parameters of the remedy when it ruled that the wrongful death remedy would allow the recovery of pecuniary losses, funeral expenses and loss of society.

with §1983 claims. This belief is based on the perceived Congressional intent not to pre-empt the states' carefully wrought wrongful death remedies, the adequacy in a death case of the state remedies to vindicate a civil rights violation, and the overwhelming acceptance of such state remedies in the federal courts.<sup>11</sup>

The plaintiff's fourth and final theory for obtaining a separate recovery under her §1983 claim is that she was deprived of her own constitutional rights. While not forthrightly articulating just what those rights are, she alleges in her complaint that her rights were violated because her child's right to life, his right to freedom from physical abuse and intimidation, and his right to equal protection of the laws were violated.

These deprivations, however, are really those of her son. The federal courts have consistently held that one may not sue for the deprivation of another's rights under §1983, and that a cause of action can be maintained only by the "person injured." See

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<sup>11</sup> Were we to rule otherwise, this court would have to fashion a remedy for a federal right bottomed on a federal statute that itself has no provisions concerning the class of beneficiaries, the proper parties to bring suits, and the type of damages. For example, it is still unclear in a Moragne wrongful death action whether such an action is limited to dependents only. See, e.g., Hamilton v. Canal Barge Co., 395 F. Supp. 978 (E.D. La. 1975).

Hall v. Wooten, supra, n. 4, and Javits v. Stevens, supra, n. 4, and cases cited therein. She therefore cannot sue in her own right for the deprivation of her son's rights apart from her remedy under the wrongful death cause of action.

Furthermore, the state did not directly attempt to restrict her own personal decisions relating to procreation, contraception, and child-rearing which are involved in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). Although the death of a family member represents a loss to her, we, nonetheless, are of the opinion that §1983 was not designed to compensate for these collateral losses resulting from injuries to others. Otherwise, damages would infinitely extend not only to parents and children, but to siblings and perhaps even to a "family" of close friends. The interests protected by §1983 are adequately vindicated when actions are brought by the injured parties themselves, or at their death, by those designated in our wrongful death statute.

The judgment is affirmed.

MR. CHIEF JUSTICE PRINGLE and MR. JUSTICE GROVES dissent.

MR. JUSTICE KELLEY does not participate.

APPENDIX "B"  
CLERK'S OFFICE  
SUPREME COURT  
STATE OF COLORADO  
DENVER 80203  
June 21, 1976

CASE NO. 26828  
Jones  
v.  
Hildebrant

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Gentlemen:

The following proceeding was this day  
had in the above numbered and titled case:

The petition for rehearing was denied.

Yours very truly,

RICHARD D. TURELLI, Clerk.

By Therese Hark  
Deputy Clerk.

1-b

No. 26828 - Jones v. Hildebrant

MR. CHIEF JUSTICE PRINGLE dissenting:

I respectfully dissent.

I do not believe that Colorado's judicial  
limitation of net pecuniary loss as a measure of damages  
for wrongful death applies to actions founded upon  
42 U.S.C. §1983 (1970).

I am authorized to say that MR. JUSTICE GROVES  
joins in this dissent.

16a

Colo. Rev. Stat. Ann. §§13-21-201 through 13-21-203:

"13-21-201. Damages for death. (1) When any person dies from any injury resulting from or occasioned by the negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employee while running, conducting, or managing any locomotive, car, or train of cars, or of any driver of any coach or other conveyance operated for the purpose of carrying either freight or passengers for hire while in charge of the same as a driver, and when any passenger dies from an injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or other conveyance operated for the purpose of carrying either freight or passengers for hire, the corporation or individuals in whose employ any such officer, agent, servant, employee, master, pilot, engineer, or driver is at the time such injury is committed, or who owns any such railroad, locomotive, car, or other conveyance operated for the purpose of carrying either freight or passengers for hire at the time any such injury is received, and resulting from or occasioned by the defect or insufficiency above described shall forfeit and pay for every person and passenger so injured the sum of not exceeding ten thousand dollars and not less than three thousand dollars, which may be sued for and recovered:

- (a) By the husband or wife of deceased; or
- (b) If there is no husband or wife, or he or she fails to sue within one year after such death, then by the heir or heirs of the deceased; or
- (c) If the deceased is a minor or unmarried, then by the father or mother who may join in the suit, and each shall have an equal interest in the judgment; or if either of them is dead, then by the survivor.

(2) In suits instituted under this section, it is competent for the defendant for his defense to show that the defect or insufficiency named in this section was not a negligent defect or insufficiency. If the action under this section is brought by the husband or wife of the deceased, the judgment obtained in said action shall be owned by such persons as are heirs at law of the deceased under the statutes of descent and distribution, and shall be divided among such heirs at law in the same manner as real estate is divided according to said statute of descent and distribution."

\* \* \*

"13-21-202. Action notwithstanding death. When the death of a person is caused by a wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable in an action for damages notwithstanding the death of the party injured."

\* \* \*

"13-21-203. Limitation on damages. (1) All damages accruing under section 13-21-202 shall be sued for and recovered by the same parties and in the same manner as provided in section 13-21-201, and in every such action the jury may give such damages as they may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue; and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect, or default; except that if the decedent left neither a widow, widower, nor minor children, nor a dependent father or mother, the damages recoverable in any such action shall not exceed forty-five thousand dollars. No action shall be brought and no recovery shall be had under both section 13-21-201 and section 13-21-202 and in all cases the plaintiff is required to elect under which section he will proceed.

(2) This section shall apply to a cause of action based on a wrongful act, neglect, or default occurring on or after July 1, 1969. A cause of action based on a wrongful act, neglect, or default occurring prior to July 1, 1969, shall be governed by the law in force and effect at the time of such wrongful act, neglect, or default."